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**PUBLIC DOCUMENT**
Enforcement III/8: PMT

MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for the Administrative Review of Stainless Steel Sheet and Strip in Coils from Germany: July 1, 2001 through June 30, 2002.

SUMMARY:

We have analyzed the comments and rebuttal comments of interested parties in the 2001 - 2002 administrative review of the antidumping duty order covering stainless steel sheet and strip in coils from Germany. As a result of our analysis, we have made changes, including corrections of certain programming and clerical errors, in the margin calculations. We recommend that you approve the positions we have developed in the "Discussion of Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments by parties:

1. Assessment Rate Methodology
2. Interest Expenses
3. Packing Costs
4. Downstream Home Market Sales
5. Treatment of Non-Dumped Sales
6. Other Revisions to Calculations

BACKGROUND

On August 7, 2003, the Department of Commerce (the Department) published the preliminary results of administrative review of the antidumping duty order covering stainless steel sheet and strip in coils from Germany. See Stainless Steel Sheet and Strip in Coils from Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review, 68 FR 47039 (August 7, 2003) (Preliminary Results). The merchandise covered by this order is stainless steel sheet and strip in coils as described in the "Scope of the Review" section of the Federal Register notice. The period of review (POR) is July 1, 2001, through June 30, 2002. We invited parties to comment on our Preliminary Results. This review covers ThyssenKrupp Nirosta GmbH, ThyssenKrupp VDM GmbH, and their various affiliates (collectively, TKN or respondents).

On September 5, 2003 we issued a supplemental questionnaire requesting downstream sales from Thyssen Schulte, an affiliate of TKN. TKN responded to this request for information on October 3, 2003. The Department issued another supplemental questionnaire to TKN on October 29, 2003 and TKN submitted its response on November 12, 2003. We issued a final supplemental to TKN on December 30, 2003, to which TKN responded on January 12, 2004.

*Comment 1 Assessment Rate Methodology*

Respondents argue the Department should recalculate the assessment rate to account for merchandise that was first sold to customers outside the United States. During the POR, TKN explains, a U.S. affiliate imported subject merchandise which was subsequently re-sold to parties in a third country. Citing Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review (S4 from Mexico POR1), 67 FR 6490 (February 12, 2002) and the accompanying Final Issues and Decision Memorandum at Comment 15, TKN contends merchandise first sold to an unaffiliated customer outside the United States is not subject to the assessment of dumping duties.

TKN asserts that in order to avoid assessing dumping duties on such merchandise, the Department should include the entered value of the merchandise in the denominator used to determine the assessment rate. See TKN's Case Brief at 6. TKN contends the Department in S4 from Mexico determined it was appropriate to "include the entered value of merchandise sold to unaffiliated parties outside the United States in the denominator used to determine the assessment rate in order to facilitate the Customs' collection of antidumping duties on subject merchandise." See TKN's Case Brief at 7. TKN maintains the Department followed the same methodology in making a similar adjustment to the assessment rate in Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review *(*S4 from Mexico POR2*)*, 68 FR 6889 (February 11, 2003) and accompanying Final Issues and Decision Memorandum. TKN argues the Department's analysis and findings in those proceedings are applicable in the current review of stainless steel sheet and strip in coils from Germany. TKN urges the Department to modify the U.S. program to include the entered

quantity and entered value of merchandise sold to unaffiliated parties outside the United States (provided in Exhibit C-1 of TKN's November 5, 2002 Section C questionnaire response) to TKNNA's entered quantity and entered value. TKN provides computer programming language to execute its suggested revision.

Petitioners[1] argue the methodology suggested by respondent should only be utilized if other steps are taken to ensure that the duty assessment rate and the cash deposit rate are both accurately calculated and applied. Petitioners assert TKN's proposed methodology is acceptable if is intended to apply to all entries of subject merchandise during the POR, whether they were transshipped or sold in the United States. Petitioners contend the methodology is administratively easier, because it avoids requiring importers to link merchandise that has been re-exported to entries during the POR for purposes of exempting the entries of those re-exports from antidumping duties. If, however, this adjusted assessment rate was then applied only to those shipments sold in the United States (i.e., excluding any transhipped merchandise), it would have the effect of under-collecting the duties properly owed.

Petitioners argue that if the Department implements Respondent's proposed methodology, then the liquidation instructions to U.S. Customs and Border Protection (Customs) should include explicit instructions that antidumping duties are to be assessed using the calculated percentage assessment rate against all entries of merchandise during the POR. The Department, petitioners insist, should indicate that the rate has been calculated in a manner that takes into account the existence of certain entries that were re-exported and thus are exempt from antidumping duties under Torrington Co. v. United States, 82 F. 3d 1039, 1046 (Fed. Cir. 1996) (Torrington).

Petitioners assert an alternative approach should be considered which would be more faithful to the Federal Circuit's findings in Torrington. Petitioners suggest excluding the entered values of the re-exported sales from the denominator. They assert the resulting assessment rate would then be applied only to the reported sales of merchandise in the United States during the POR. Petitioners explain that to apply this assessment rate only to U.S. sales, the Department would revise its instructions to Customs, ordering the assessment of duties on all POR entries, except those for which the importer provides evidence that the merchandise was re-exported during the POR. Petitioners suggest the Department could instruct Customs to refund the cash deposits of antidumping duties on the entries linked by the respondent to the re-exported sales. Petitioners assert this method will not pose a burden to TKN or its U.S. affiliate, TKN North America, to gather and provide documentation in this case given that they already have segregated this body of entries when reporting the volume and value of the entries in Exhibit C-1 of TKN's November 5, 2003 Section C questionnaire response.

**Department's Position**:

[1]Petitioners are: Allegheny Ludlum Corporation, AK Steel Corporation, J&L Specialty Steel, Inc., North American Stainless, United Steelworkers of America, AFL-CIO/CLC, Butler Armco Independent Union, Zanesville Armco Independent Organization, Inc.

We agree with respondent and we partially agree with petitioners. The Department will include the entered quantity and entered value of merchandise sold to unaffiliated parties outside the United States to TKNNA's entered value and entered quantity in order to determine the assessment rate for TKNNA. Such a methodology is appropriate to prevent assessment of antidumping duties on merchandise that was sold for consumption outside of the United States. Also, the Department will send Customs explicit instructions that antidumping duties are to be assessed using the calculated percentage assessment rate against all entries of merchandise during the POR. The Department will not utilize petitioners' alternative method (i.e., requiring TKNNA to provide documentation of re-exported sales to Customs) because it is unduly burdensome. TKN's suggested methodology will achieve the same end with far less administrative burden to Customs, to TKNNA, and to the Department.

See the Department's Final Analysis Memorandum, dated February 3, 2004, for further details regarding the calculations needed to adjust the assessment rate.

*Comment 2 Interest Income Offset*

In reporting its net financial expenses, TKN offset interest expenses with short-term interest income. Respondents argue the Department should use the interest income offset as reported in the audited consolidated financial statements of parent company ThyssenKrupp AG (TKAG). Respondents claims the descriptions of the general ledger accounts comprising the interest income amount show the interest income items listed under these accounts are short-term in nature and, thus, appropriate as an offset to interest expenses.

Petitioners object to TKN's request that the Department use TKAG's interest income offset as TKN originally reported. Petitioners argue the respondents' claim that the short-term nature of certain interest income account names is self-evident does not provide substantial evidence to overcome the Department's verification findings that TKN could not support its claim that these accounts represent only short-term interest income. Petitioners suggest the Department should continue to apply the revised short-term interest income offset as calculated for the preliminary results.

**Department's Position**:

We agree with petitioners. At verification TKN provided a schedule of interest income by general ledger accounts, but failed to substantiate its claim that these accounts pertain exclusively to short-term interest income. As noted in the Notice of Final Determination of Sales At Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from France 64 FR 30820,30837 (June 8, 1999), the Department excluded the respondent's short-term interest income offset because neither of the respondent's audited financial statements reported any breakdown of long- versus short-term income, nor was the respondent able to provide support for its claimed short-term interest income. Therefore,

for these final results, we continued to use the revised amount of short-term interest income calculated for the preliminary results to offset financial expenses.

*Comment 3 Adjustment for Packing Cost*

Respondents argue that in the preliminary results the cost of sales denominator used in the calculation of the interest expense rate was adjusted incorrectly for packing expenses. TKN notes the Department estimated the amount of packing expenses to adjust the cost of sales at the consolidated TKAG level by using the ratio of packing expenses to cost of goods sold recorded by TKN at its stainless operations. While respondents agree the adjustment to the cost of goods sold denominator for packing costs is appropriate, they claim the manner in which the adjustment was made is not. According to the respondents, this is because the consolidated TKAG entity comprises a vast array of companies involved in diverse activities, ranging from real estate management to elevator construction. Under these circumstances it is not reasonable to apply the respondents' unique experience as stainless steel producers to the consolidated costs of their parent, TKAG.

Petitioners state the Department should not revise its non-adverse facts available used for the preliminary results to adjust for the respondents' failure to quantify TKAG's consolidated packing expenses.

**Department's Position**:

We agree with petitioners. In the section D supplemental questionnaire, the Department requested that TKN quantify the packing expenses included in the cost of goods sold denominator used to calculate the consolidated interest expense rate. In its March 7, 2003 response, TKN stated that because of the complex corporate structure of TKAG, respondents were unable to isolate the packing expenses included in the consolidated cost of sales denominator. Therefore, according to our normal practice, we estimated the consolidated packing costs included in TKAG's consolidated cost of goods sold based on the observed packing costs included in TKN's cost of goods sold. See Issues and Decision Memorandum for the Antidumping Investigation of Cold Rolled Carbon Steel Flat Products from Germany; Notice of Final Determination of Sales at Less Than Fair Value, 67 FR 62116 (October 3, 2002) (Comment 17). Thus, for the final results, we continued to estimate TKAG's consolidated packing expenses based on the ratio of packing expenses to cost of goods sold experienced by TKN, and deducted them from the consolidated cost of sales used as the denominator for the interest expense rate calculation.

*Comments 4 Downstream Home Market Sales*

TKN's reported downstream home market sales in this review included a number of transactions with incomplete product characteristic data. TKN argues the Department should disregard these transactions for purposes of the final margin calculation. TKN asserts under established Department practice and Court of International Trade precedent, the most appropriate approach would be to exclude the sales with missing product characteristics outright from the Department's margin calculation. Respondents contend the Department's model match programs in this case, and presumably in the other stainless steel antidumping cases, are specifically designed to exclude home market sales from being used as matches if they have missing characteristics or characteristics unaccounted for in the Department's relative weights. TKN contends the Department applied programming language in the first administrative review of this order which excluded a number of downstream home market sales that were missing certain product characteristics. TKN also asserts the Department used the same methodology in Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada, 61 FR 13815, 13830-31 (March 28, 1996) (Carbon Steel From Canada), as affirmed by the Court in AK Steel Corp. v. United States, Slip Op. 97-152, 1997 WL 728284 (CIT 1997) (AK Steel). TKN maintains that, in that case, the respondent informed the Department there were a number of sales in the home market for which it was unable to provide product characteristic information. The majority of those sales, TKN continues, were seconds but others were "excess" prime sales (sales of prime merchandise sold at a reduced price for which full and complete product characteristics information was not needed to make the sale to the customer). See TKN's Case Brief at 15.

TKN argues the same circumstances which existed in AK Steel apply in this case. First, it maintains the sales' missing product characteristics were not commercially meaningful. The sales are made in "bundles," where individual product characteristics may vary from item to item within each invoice line-item and where the missing product characteristics are not relevant or meaningful to the purchaser. Second, TKN asserts most of the sales missing product characteristics involve non-prime material that would not match to U.S. sales of prime TKN products. TKN states it expects any home market sales of prime TKN products that are missing product characteristics will account for only a very small percentage of all home market sales of such products. Respondents conclude that excluding these sales for price comparisons purposes would not have any distortive impact. Third, TKN asserts it has acted to the best of its ability to compile and submit as much information on the product characteristics as possible, including the manual compilation of data that is not available electronically from the computerized invoicing systems. TKN concludes these circumstances are almost identical to those present in Carbon Steel From Canada and argues the Department should adopt the same methodology with respect to the sales that are missing certain product characteristics and exclude these sales from the model match methodology.

Petitioners counter that TKN has failed to act to the best of its ability within the meaning of section 776(b) of the Act. Citing Nippon Steel Corp. v. United States, 337 F. 3d 1373 (Fed. Cir. 2003) (Nippon Steel), petitioners note the Federal Circuit ruled that to conclude a party has not cooperated to the best of its ability and to draw an adverse inference, the Department must make two findings.

First, the Department must find whether a reasonable and responsible party would have known it was required to keep and maintain the information being requested (here, the physical characteristics of products sold by TKN affiliates Nirosta Service Center (NSC) and Thyssen Schulte of TKN's products in Germany). Second, the Department must conclude that a respondent such as TKN has not properly produced the requested information due either to 1) a failure to keep and maintain all records or 2) a failure to put forth its maximum efforts to retrieve the requested information from its records. See Petitioners' Brief at 5. Petitioners argue TKN has not satisfied these requirements in this review and, thus, is subject to the use of facts available.

Petitioners assert the Department has instructed respondents since the original investigation to report the actual physical characteristics of the foreign like product and subject merchandise they sell in the home market and in the United States, respectively. Petitioners further maintain that TKN's inability over multiple segments of this proceeding to provide the requested data, and its repeated protestations that it does not need to maintain the required information, provide substantial evidence that the respondent has known what data are required, yet has failed to keep and maintain all required records. Petitioners note this review is the fourth segment of these proceedings. Thus, petitioners assert TKN and its sister companies have had more than five years to remedy deficiencies in their documentation of product characteristics. Petitioners note TKN's failure to fill in lacunae in its record keeping by the third segment of the proceeding resulted in the preliminary use of partial adverse facts available in the 2000 - 2001 administrative review (the Department changed this to neutral facts available in the final results). Thus, TKN was on notice of the problems existing in its recording of certain product characteristics. Petitioners assert TKN has had both the time and resources over the past several years to correct the deficiencies in its computerized product characteristic reporting system. That TKN ignored these problems, petitioners aver, indicates a failure to cooperate by acting to the best of its ability, and warrants the use of partial adverse facts available. See Petitioner's Case Brief at 8.

Petitioners argue that under Nippon Steel, TKN should be held accountable for tracking, retaining in its records, and then timely producing for the Department the detailed information necessary for accurate calculation of dumping margins with respect to the physical characteristics of NSC's and Thyssen Schulte's resales of TKN's products in Germany. Petitioners assert TKN has not shown an inability to keep such records. On the contrary, petitioners assert considerable records already are maintained on the physical characteristics of many of NSC's and Thyssen Schulte's resales of TKN's products, albeit in a manner that requires manual retrieval. However, petitioners contend, the fact that such records must be retrieved manually does not excuse the respondent from compliance with the Department's attempts to obtain necessary information, particularly in a review conducted at TKN's request.

Petitioners assert the statute permits, but does not require, the Department to allow an interested party to submit information in a form or manner different from that requested by the Department. Citing section 782(c) of the Tariff Act, petitioners contend the Department's decision to permit a respondent to employ an alternative reporting methodology is discretionary. In addition, petitioners assert, the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act makes

clear that the ability of a respondent to seek dispensation from the Department to report its information and data using an alternative reporting methodology is not meant to permit a respondent to avoid its reporting obligations, but is intended to address such reporting difficulties as incompatible computer media and languages. Petitioners argue the primary intent of section 782(c)(2) of the Tariff Act is to assist small firms and firms in developing countries in dealing with difficulties arising in the area of incompatible information systems, and stress the need for a respondent to demonstrate that abiding by the Department's request would impose an unreasonable extra burden on the company. See Petitioners' Case Brief at 13.

Petitioners urge the Department to apply as partial adverse facts available the highest gross unit price of home market sales of the same grade to sales where a surrogate value was used for a missing physical characteristic. Petitioners contend using TKN's own data as the source of partial adverse facts available in this review will provide an appropriate level of incentive for the respondents to cooperate fully and report all required physical characteristics concerning its sales of foreign like product.

If the Department does not apply partial adverse facts available, petitioners argue it should rely upon partial non-adverse facts available. Petitioners assert the sales with surrogate physical characteristics should be excluded from the sales calculation if partial adverse facts available is not applied. See Petitioners' Case Brief at 18.

**Department's Position**:

As in previous reviews in this case, the Department will calculate a dumping margin utilizing the database submitted by TKN on behalf of its affiliated resellers. The Department finds TKN has been cooperative and acted to the best of its ability, and therefore we will not apply partial adverse facts available. The Department will continue to utilize all of the data reported by TKN for its affiliated resellers, and therefore we will not change the calculation by excluding sales with surrogate value for the reasons discussed below.

We have determined that no adverse inference is warranted because TKN has provided the physical characteristics for sales by its affiliated resellers, NSC and Thyssen Schulte, in the most precise manner permitted by its accounting system. On September 4, 2002 and September 5, 2003 the Department sent TKN extensive questionnaires regarding sales information. On November 5, 2002 and October 3, 2003 TKN submitted its response. TKN demonstrated in this review and in previous reviews that NSC and Thyssen Schulte manually retrieved physical characteristics required by the Department. When a manual retrieval was not possible, the Department accepted TKN's methodology in reporting surrogate values for ROLLH, GAUGE1H/GAUGE2H, FINISHH, and WIDTH1H/WIDTH2H. These variables comprise four of the nine physical characteristics the Department requires in its model mathing program.

In addition, as in previous reviews, the Department will not disregard the reported information and therefore will continue to include them in the calculation. TKN was able to provide the five remaining physical characteristics and relevant sales information, i.e., gross unit price, billing adjustments, etc. The Department finds that the remaining physical characteristics and sales information is essential in the calculation of an antidumping margin. We find nothing in the record to indicate that relying on the surrogate values produced by TKN for the missing information, as we have in prior reviews, is in any way distortive or unreasonable, given the commercial realities attendant to these transactions (i.e., that these characteristics were irrelevant to the final customer and were, therefore, not recorded by TKN).

We continue to find TKN has exercised due diligence in reporting its sales data, undertaking a manual search for the missing information and providing these data to the extent they were available. See Stainless Steel Sheet and Strip in Coils from Germany; Notice of Final Results of Antidumping Administrative Review, 68 FR 6716 (February 10, 2003)

*Comment 5 Treatment of Non-Dumped Sales*

TKN states that in the preliminary results, the Department calculated the overall dumping margin by assigning a zero-percent dumping margin to U.S. sales made at or above home market prices. TKN argues the practice of "zeroing" constitutes a violation of the Department's obligations under U.S. law. Citing Federal Mogul Corp. v. United States, 63 F. 3d 1572, 1581 (Fed. Cir. 1995), Viraj Forgings Ltd. v. United States, 206 F. Supp. 2d 1288, 1296 n. 14 (CIT 2002), and Funaciao Tupy S.A. v. United States, 652 F. Supp. 1538, 1543 (CIT 1987), TKN states it is a well-established principle of U.S. law that the Department must interpret and apply the U.S. dumping laws in a way that does not conflict with international obligations, including obligations under the WTO Antidumping Agreement. TKN asserts this principle is rooted in Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118 (1804) (Charming Betsy), in which the Supreme Court declared that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." TKN maintains the doctrine set forth in Charming Betsy is still in effect today.

Citing, inter alia, Böwe Passat Reinigungs-Und Wäschereitechnik GmbH v. United States 926 F.Supp. 1138 (CIT 1987), Corus Engineering Steels Ltd. v. United States, Slip Op. 03-110 (CIT 2003) (Corus) and PAM, S.p.A. v. US Department of Commerce, Slip Op. 03-48 (CIT May 8, 2003) (PAM), TKN asserts the Court, even though it upheld the Department's practice of zeroing, found "the statute neither requires nor prohibits [the Department] from considering non-dumped sales. See TKN's Case Brief at 19, quoting Corus at 13-14 (TKN's emphasis deleted). TKN contends the Department adopted and applied its zeroing practice solely as a matter of interpretive "gap-filling." TKN argues the Department is obligated to exercise its gap-filling authority so as to reach a result that is consistent with international law.

TKN maintains the Department's interpretation of the statute, to the extent it is reasonable, is generally given deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (Chevron). However, TKN argues, when the Department's interpretation is inconsistent with U.S. international obligations, such deference is inappropriate. TKN avers that Hyundai Electronics Co., Ltd. v. United States, 53 F. Supp. 2d 1334 (CIT 1999) (Hyundai Electronics) is instructive on this point. In Hyundai Electronics, TKN notes, the Court contemplated a revocation standard promulgated by the Department that recently had been rejected by a WTO panel. While the Court eventually found it was possible to reconcile the Department's revocation standard with the WTO Antidumping Agreement, TKN states, the Court stressed that Chevron and the Charming Betsy doctrine must be applied together when the latter is implicated. See TKN's Case Brief at 21, citing Hyundai Electronics at 1344.

TKN asserts the same analysis must be applied in this case. Since the statute is silent with respect to "zeroing" and the Department has adopted this practice as an interpretation of the statute, TKN claims the relevant question is whether the Department's interpretation is compatible with the WTO Antidumping Agreement. TKN contends the WTO Appellate Body's decision in European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 1, 2001) (Bed Linen from India) establishes that "zeroing" is not compatible with the Antidumping Agreement. TKN states that in Bed Linen from India, the WTO Appellate Body upheld a WTO Panel finding that the European Communities (EC) had violated Article 2.4.2 of the Antidumping Agreement by "zeroing" negative price differences when computing the aggregate dumping margin. According to TKN, in that case the WTO Panel noted the Antidumping Agreement refers to dumping margins only in the context of the whole product. TKN contends that since the EC defined the product as "'certain bed linens from India,' it was bound to calculate an aggregate dumping margin on the basis of that whole product group, not just the sub-group of sales that generated a positive dumping margin." TKN's Case Brief at 23. TKN states the WTO Panel and Appellate Bodies also determined the EC's approach prevented a fair comparison of the export price and NV, because the WTO found that by "zeroing" negative margins "the EC had effectively manipulated the prices of the subject products to produce a higher dumping margin than they actually generated." Id.

TKN argues it is irrelevant that the United States was not the appellee in Bed Linen from India. Furthermore, TKN asserts, it is also irrelevant that Bed Linen from India entailed an investigation rather than an administrative review because the terms of Article 2 of the Antidumping Agreement are made applicable to the determination of assessment amounts in the context of administrative reviews by virtue of Article 9.3 of the Antidumping Agreement.

Since U.S. antidumping laws do not require "zeroing," TKN argues, there is no direct conflict between U.S. law and international law. Further, TKN asserts, under the Charming Betsy doctrine the U.S. antidumping statute must be interpreted in a way that is compatible with the WTO Antidumping Agreement. Therefore, TKN submits, any interpretation of U.S. antidumping law that permits "zeroing"

in the calculation of the aggregate dumping margin is prohibited as a matter of U.S. law under Charming Betsy.

Petitioners respond that in each instance in which the issue of "zeroing" has been raised, the Department has correctly dismissed this argument and maintained its current practice. Petitioners cite as examples Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Germany, 67 FR 55802 (August 30, 2002) (Wire Rod from Germany) and the accompanying Issues and Decision Memorandum at Comment 10; Stainless Steel Wire Rod From India; Final Results of Antidumping Duty Administrative Review, 67 FR 37391 (May 29, 2002) and the accompanying Issues and Decision Memorandum at Comment 5; and Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Spain, 67 FR 35482 (May 20, 2002) and the accompanying Issues and Decision Memorandum at Comment 15. Petitioners contend the Department's methodology as articulated in these decisions is factually and legally distinct from the methodology employed in Bed Linen from India. Therefore, petitioners assert, the WTO's decision in that case does not apply to dumping calculations performed under U.S. law.

Petitioners argue the Department's current practice is consistent with the statute, which does not allow dumping margins to be canceled out by non-dumped sales. Petitioners states the Court noted in Corus that WTO decisions are not binding on the Department, U.S. courts or even the WTO itself. See Petitioners' Rebuttal Brief at 11, citing Corus, Slip Op. 03-25 at 18. Petitioners assert the Court also found, consistent with every other Court decision on zeroing, that contrary to the Appellate Body's view, Article 2.4.2 of the Antidumping Agreement does not clearly prohibit zeroing. Id. Petitioners therefore urge the Department to maintain its standard calculation methodology.

**Department's Position**:

We disagree with TKN and have not changed our calculations of the weighted-average dumping margin as suggested by the respondent for these final results. As TKN cited in its case brief, the Court upheld the Department's treatment of non-dumped sales in Corus, PAM, and The Timken Company v. United States, 240 F. Supp. 2d 1228 (CIT 2002), and our methodology is consistent with our statutory obligations under the Tariff Act.

Furthermore, the Federal Circuit recently affirmed the Department's methodology. The Timken Company v. United States, No. 03-1098, 03-1238, 2004 U.S. App. LEXIS 627 (Fed. Cir. Jan. 16, 2004) (Decision not final as of this determination). As discussed below, we include U.S. sales that were not priced below NV in the calculation of the weighted-average margin as sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not, however, allow U.S. sales that were not priced below NV to offset dumping margins found on other sales.

Section 771(35)(A) of the Tariff Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Section 771(35)(B) defines "weighted-average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." These sections, taken together, direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which NV value exceeds export price or CEP, and to divide this amount by the value of all sales. The directive to determine the "aggregate dumping margins" in section 771(35)(B) makes clear that the singular "dumping margin" in section 771(35)(A) applies on a comparison-specific level, and does not itself apply on an aggregate basis. The Tariff Act does not direct the Department to factor negative price differences (i.e., the amount by which export price or CEP exceeds NV) into the calculation of the weighted-average dumping margin. In other words, the value of non-dumped sales is not permitted to cancel out the dumping margins found on other sales.

This does not mean, however, that non-dumped sales are ignored in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR: the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

Furthermore, this is a reasonable means of establishing estimated duty-deposit rates in investigations and assessing duties in reviews. The deposit rate we calculate for future entries must reflect the fact that Customs is not in a position to know which entries of subject merchandise are dumped and which are not. By spreading the liability for dumped sales across all reviewed sales, the weighted-average dumping margin allows Customs to apply this rate to all merchandise subject to review.

Finally, with respect to respondent's WTO-specific arguments, we note U.S. law, as implemented through the URAA, is fully consistent with our WTO obligations.

*Comment 6 Other Revisions to the Calculation*

1. Petitioners assert the Department should revise the reported Thyssen Schulte foreign inland freight charges (INLFTCH).

   TKN responds that the Department should base the final margin calculation on Thyssen Schulte's reported inland freight charges.

2. Respondent and Petitioners contend the Preliminary Results did not account for the non-prime merchandise sales identified in the U.S. and home market sales listing. Each party has suggested similar computer language to correct the error.

3. TKN contends fields WRPREMU and HMOTHRU were twice converted from hundredweight to metric tons.

4. TKN asserts BILLADJU and BILLADJH were not included in the CEP profit calculation.

5. TKN states PACKU was not converted to euros in the CEP profit calculations.

6. TKN asserts the assessment rate should be calculated as a percentage of entered value instead of as a per-unit amount.

**Department's Position:**

The Department acknowledges we have made the clerical and programming errors noted above. We have corrected each of these errors in our final results. For all program corrections and adjustments made in our final results, see Final Analysis Memorandum, February 3, 2004.

In regards to Thyssen Schulte's inland freight, the Department sent TKN a supplemental questionnaire on December 30, 2003 to clarify Thyssen Schulte's inland freight charge. TKN submitted their response on January 12, 2004. Petitioners did not comment on the new submission. Upon review of the record, the Department finds that a recalculation of Thyssen Schulte's inland freight charge is not warranted, and therefore accepts the inland freight charge reported in TKN's January 12, 2004 supplemental response.

*Recommendation*

Based on our analysis of the comments received, we recommend adopting all of the positions set forth above and adjusting all related margin calculations accordingly. If these recommendations are accepted, we will publish the final determination and the final weighted-average dumping margins for all firms in the Federal Register.

Agree_____ Disagree_____ Let's Discuss_____

James J. Jochum
Assistant Secretary
for Import Administration

Date